Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill
P.O. Box 1475
Nashville, TN 37202

MICHAEL GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. The Scope of the Public Policy Exception In § 301 Cases	1
II. The Asserted Public Policy Bases For Vacating The Arbitration Award Here	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) ---- 2
Auto Workers v. Keystone Consolidated Industries, Inc., 782 F.2d 1400 (7th Cir. 1986), *vacated*, —— F.2d —— (7th Cir. 1987) ---------- 15
Baltimore & O.S.R. Co. v. Voigt, 176 U.S. 498 (1900) ---------- 8
Belves Co. v. Teamsters Local 968, 791 F.2d 1391 (9th Cir. 1986) ---------- 15-16
Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) ---------- 8
Bowen v. United States Postal Service, 459 U.S. 212 (1983) ---------- 10-11
Chicago B&Q R.Co. v. McGuire, 219 U.S. 549 (1911) ---------- 9
Chicago Drivers Union v. Denton Cartage Co., 648 F.Supp. 1009 (N.D. Ill. 1986) ---------- 15
Culinary Union Local 226 v. Riverboat Casino, Inc., —— F.2d ——, No. 86-2104 (9th Cir. May 14, 1987) ---------- 16
Electrical Workers v. Hechler, —— U.S. ——, 55 L.W. 4694 (May 26, 1987) ---------- 20
Electrical Workers v. Otis Elevator, 314 F.2d 25 (2d Cir. 1963) ---------- 19
Enterprise Wire Co. (46 LA 359) ---------- 20
Drummon Coal Co. v. Mine Workers, 748 F.2d 1459 (11th Cir. 1984) ---------- 16
Hilton International Co. v. Union de Trabajadores, 600 F.Supp. 1446 (D.P.R. 1985) ---------- 16
Labor Board v. Insurance Agents, 361 U.S. 477 (1960) ---------- 2-3
Metropolitan Edison Co. v. Electrical Workers, No. 86-6553 (E.D. Pa. Aug. 14, 1987) ---------- 16
Muschany v. United States, 324 U.S. 49 (1945) --- 6
Northwest Airlines v. Air Line Pilots Association, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548 ----------13, 14-15

TABLE OF AUTHORITIES—Continued

Page

Orange Belt Dist. Council of Painters v. Kashak, 774 F.2d 985 (9th Cir. 1985) ---- 16
736 F.2d 822 (1st Cir. 1984) ---- 11-12, 14
Postal Service v. American Postal Workers Union, Professional Administrators Ltd. v. Blevins, No. 86-5556 (6th Cir., May 26, 1987) ---- 15
Railroad Trainmen v. Terminal Co., 394 U.S. 369 (1969) ---- 2
Reiter v. Sonotone Corp., 442 U.S. 330 (1979) ---- 11
Richardson v. Mellish, 2 Bing. 229, 130 Eng. Rep. 294 (1924) ---- 1
S.D. Warren Co. v. Paperworkers, 815 F.2d 178 (1st Cir. 1987) ---- 12, 14
S.D. Warren Co., AAA No. 1130-0908-84 (Sept. 19, 1985) ---- 12
Steele v. Drummon, 275 U.S. 199 (1927) ---- 20
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) ---- 1
Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) ---- 1, 3, 14
Steelworkers v. National Can Corp., No. 86-C-7390 (N.D. Ill. June 11, 1987) ---- 16
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) ---- 1
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962) ---- 3
Teamsters Union v. Oliver, 358 U.S. 283 (1959) ---- 3
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) ---- 10
United States Postal Service v. Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987) ---- 14
United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 (1897) ---- 9
Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844) ---- 8
W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) ---- *passim*

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Labor Management Relations Act of 1947, 29 U.S.C. § 301 ---------- *passim*
National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. ---------- *passim*

MISCELLANEOUS:

6A *Corbin on Contracts* (1962) ---------- 8
14 S. Williston, *A Treatise on the Law of Contracts* (3rd Cir. 1972) ---------- 8
Restatement (Second) of Contracts ---------- 8, 9

REPLY BRIEF FOR THE PETITIONERS

In our opening brief we presented two alternative grounds on which the judgment below should be reversed: first, that in an action to enforce a labor arbitration award brought pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 301 ("LMRA"), a court may not set aside the award as "contrary to public policy" unless the collective bargaining agreement, as interpreted by the arbitrator, violates positive law; and second, that even if the public policy exception to the general rules on enforcing arbitration awards stated in the *Steelworkers Triology*[1] were not so limited, there still would be no basis for concluding that the arbitration award at issue here offends public policy. We respond to the arguments of respondent Misco, Inc. ("Misco") and Northwest Airlines *et al.* as *amici curiae* ("NWA") as those arguments relate to our two principal contentions.

I. The Scope of the Public Policy Exception in § 301 Cases

1. Over one-hundred and fifty years ago the English courts recognized that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824). The briefs of Misco and NWA confirm the acuity of that insight.

Misco and NWA vigorously contest our submission that the proper role for a court, in deciding whether a labor arbitration award is contrary to "public policy," is to determine whether the award gives the collective bargaining agreement an interpretation that violates positive law. But neither Misco nor NWA is able to suggest any other limiting principle to cabin the public policy exception within ascertainable metes and bounds.

---

[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

Indeed, at bottom, Misco and NWA defend the judgment below or the ground that § 301 is an unlimited grant of authority to the courts to define which collective bargaining agreements are enforceable and which are not. Misco invokes what it terms "common sense" as its basis for contending that the arbitral award at issue here violates the public policy favoring "safety in the workplace," Resp. Br. at 19; according to Misco "the courts must retain the power to vacate awards producing absurd results which fly in the face of public health and safety policy," *id.* at 25; *see id.* at 27-28. And NWA, while less bold in its rhetoric, advocates a "flexible 'public policy' exception," NWA Br. at 16, under which the courts are to decide, *inter alia*, whether "enforcement of the [arbitral] award would be 'so unfair' as itself to violate public policy" or whether "important policies would be inappropriately affected" by enforcing the arbitral award, *id.* at 10. Neither of these approaches would place any objectively-ascertainable limit on the courts' decisional processes.

2. Misco's and NWA's understanding of the public policy doctrine applied below makes plain the conflict between that doctrine and the national labor policy.

(a) As this Court has observed, in enacting the laws that govern labor relations Congress expressed its "clear disapproval of the[] free-wheeling judicial exercices" through which judges had invented a "'general' labor law" based on "self-mesmerized views of economic and social theory." *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 382-83 (1969). In particular, in the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. ("NLRA"), Congress delineated certain *mandatory* subjects of bargaining, *see* NLRA § 8(d), 29 U.S.C. § 158(d), and decreed that with respect to those subjects, so long as parties do not "contract for what is illegal," *Allis-Chalmers v. Lueck*, 471 U.S. 202, 212 (1985), "the parties should have wide latitude in their negotiations,

unrestricted by an governmental power to regulate the substantive solution of their differences," Labor Board v. Insurance Agents, 361 U.S. 477, 488 (1960) (emphasis added).

Under the public policy exception applied below and championed by Misco and NWA here, however, the government—through the judiciary—would once again be invested with a "free-wheeling" authority over labor relations and more specifically with the power "to regulate [the parties'] solution of their differences" by refusing to enforce any agreement which offended the courts' sense of public policy. Moreover, to the extent the courts exercised that power, the courts would frustrate Congress' attempt "to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations." *Teamsters Union v. Oliver*, 358 U.S. 283, 285 (1959). The end result would be to foment labor strife—and thereby defeat the fundamental purpose of the Act—by precluding the arbitral process from being available "as a substitute for economic warfare" in certain categories of disputes, *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

(b) Both Misco and NWA stress that under their version of the public policy exception, it is for the courts—and not for employers acting unilaterally—to decide whether an employer is obligated to comply with an arbitral award. But this ignores the fact that Congress' premise, in enacting the NLRA, was that the *parties*—and *not* the government—should decide the scope of an employer's rights and obligations through free collective bargaining so long as the parties' agreement is not contrary to positive law.

Moreover, Misco and NWA disregard the indisputable point that once a court declares a particular contractual provision to be contrary to public policy and therefore unenforceable, the effect of the ruling is to leave the employer with an unfettered discretion in all future cases

to decide how to proceed on a subject that the contract, by hypothesis, is intended to govern. Thus, for example, in the instant case, in setting aside the arbitrator's award as contrary to public policy, the court below necessarily concluded that the contractual limitations which the arbitrator found the parties had established to govern discharges generally are not legally enforceable with respect to the discharge of employees who are alleged to have used or possessed marijuana. The necessary consequence of that decision, for so long as it is left standing, is that, regardless of what contractual provisions are collectively bargained, employers in the Fifth Circuit's jurisdiction enjoy *carte blanche* authority to decide whether to retain or dismiss employees found with, or even near, marijuana. Not even Misco or NWA attempt to defend that result as consistent with the national labor policy.

(c) NWA suggests that the tension that exists between its version of the public policy exception and the national labor policy exists "equally" in the "well-established rule that when the arbitrator's decision manifests an 'infidelity' to his duty to render an award that draws its essence from the labor contract, 'courts have not choice but to refuse enforcement of the award.'" NWA Br. at 18. The difference between the two situations is plain.

When a court sets aside an arbitral award on the ground that the award does not "draw its essence from the labor contract," the court is *enforcing* the parties' agreement. Such a judicial decision assures that the parties are governed by the rules that they have agreed to in collective bargaining, and not by an arbitrator's "own brand of industrial justice," *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 597. If one or the other of the parties is dissatisfied with the agreement (as construed by the court in refusing to enforce the arbitral award), the parties are free to negotiate a new provision to govern future situations of a similar nature. Thus, if a particular arbitrator oversteps his authority,

a decision correcting that error is hardly likely to lead to industrial strife.

A judicial decision invalidating an arbitral award on public policy grounds is different in kind. Such a decision, by definition, *defeats* the parties' solution to a problem they sought to resolve in collective bargaining and precludes the parties from negotiating an enforceable agreement to govern future situations. If the courts were empowered to exercise such authority in cases in which the employer is legally free to act in the manner the union desires, unions would be left with no option other than to use economic weapons to press their lawful position in comparable situations in the future.

Thus, a rule which permits the courts to refuse on public policy grounds to enforce arbitral awards which are consistent with positive law uniquely disserves the national labor policy.

3. Misco and NWA argue that notwithstanding this conflict with the national labor policy, *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), compels a broad public policy exception under which the courts are to establish their own set of rules with respect to the enforceability of collective agreements. As we proceed to show, this is an incorrect reading of *W.R. Grace*.

(a) In *W.R. Grace*, this Court, after recognizing that "a collective-bargaining agreement that is contrary to public policy is not entitled to be enforced," *id.* at 766, *declined* the employer's invitation to set aside the arbitral award at issue in that case on public policy grounds. The Court did so even though that award required the employer to compensate employees who had been laid off in the order required by a conciliation agreement which the employer and the Equal Employment Opportunity Commission had signed and which a district court had held (in an action to which the employer, union and EEOC were parties) to be lawful and "binding on all parties," *id.* at 761; the arbitrator found that the order of layoffs dictated by this court-approved conciliation agreement

violated the seniority provisions of the collective bargaining agreement. Notwithstanding the evident tension between this arbitral award and the public policy favoring "obedience to judicial orders," *id.* at 767, and favoring "[v]oluntary compliance with Title VII [of the Civil Rights Act of 1964]," *id.* at 770, the Court concluded that the arbitral award was enttiled to be enforced. Given that holding, *W.R. Grace*, is an odd place for respondent and NWA to look for support for their broad and unbounded approach to the public policy exception.

(b) Misco seeks to derive comfort from the statement in *W.R. Grace* that before a court may set aside an arbitration award on public policy grounds the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests,'" 461 U.S. at 766, *quoting*, *Muschany v. United States*, 324 U.S. 49, 66 (1945). Misco claims "[t]his language permits broader sources of public policy than violations of positive law," Resp. Br. at 27. Misco is mistaken.

What Misco fails to recognize is that "positive law" is, of necessity, *defined* by "the laws and legal precedents." Thus, we do not deny—indeed, we readily acknowledge—that courts are not to enforce an arbitral award where the award interprets the contract to obligate the employer to commit a legal wrong as defined by the "laws and legal precedents" of the relevant jurisdiction or where compliance with the remedial order would constitute such a wrong; this is true regardless of whether the wrong is a statutory violation or a tort or other common-law wrong. Similarly, we agree that an arbitral award should not be enforced if there is a legal proscription on making an agreement of the type the arbitrator found the parties had made; again this is true regardless of whether the proscription is found in statute or in precedent.

What we do contend is this: if a collective bargaining agreement, as interpreted by an arbitrator, does *not* vio-

late positive law as thus defined, the courts are *not* free in a § 301 action to invoke the rubric of public policy to create a new set of rules to preclude the enforcement of such a contract. Rather, in such circumtsances the national labor policy requires that the parties' agreement be honored. Nothing in *W.R. Grace* is inconsistent with this proposition. To the contrary, the Court's caution against resort to " 'general considerations of supposed public interests,' " strongly supports the principled limitation on the public policy exception that we urge.

(c) NWA, in turn, deems it highly significant (*see* NWA Br. at 9-10) that, in the course of holding that the arbitral award in *W.R. Grace* did not violate public policy, this Court noted that: the employer had "committed itself voluntarily to two conflicting contractual obligations," 461 U.S. at 767; enforcement of the award "will not create intolerable incentives to disobey court orders," *id.* at 769; and placing the employer in the position in which it could not make layoffs without violating either its labor contract or its conciliation agreement was not "so unfair as to violate public policy," *id.* at 770. NWA apparently believes that each of these statements rejecting as factually unsupported the company's arguments for invalidating the arbitrator's award in that case was necessary to the Court's holding and that *W.R. Grace* not only holds that the award there was enforceable but also defines the situations in which such awards are not enforceable.

NWA's argument strains the opinion well beyond the breaking point. The rejection of certain arguments on the facts of a case should not be read as a commitment to recognize the proffered considerations as determinative in all future cases. Indeed, to so read *W.R. Grace* would turn the foregoing portions of the opinion against the narrow *holding* of the case as well as against the Court's strong admonition against resort to "general considerations of supposed public interests."

4. NWA places its principal reliance on the rules that the courts have evolved, as part of the common law of contracts, to determine the enforceability of those contracts which are governed by common law. NWA's reliance on those rules is doubly flawed.

(a) In developing the common law of contracts, the courts evolved a complex set of enforceability rules "touch[ing] upon matters of substance related to the public welfare" as distinguished from the rules governing "the bargaining process between the parties," *Restatement (Second) of Contracts*, Introductory Notes to "Unenforceability in General." The leading treatises on contract law each contain a volume or more delineating these enforceability rules and covering such topics as agreements "harmful to public service," agreements "harmful to the administration of justice," agreements in restraint of trade, etc.[2]

Moreover, although occasional expressions of judicial self-restraint can be found in the common-law cases defining public policy rules,[3] the common-law courts as a general matter "with or without misgivings . . . tended to heed the axion that 'whatever is injurious to the interests of the public is void, on the grounds of public policy.'" 14 S. Williston, *supra*, § 1629. Thus, at common law, agreements were denied enforcement based on the "practices of the community of people and their notions as to what makes for the general welfare" as those were "understood by judges and administrative officers." 6A *Corbin on Contracts*, *supra*, § 1374.

---

[2] 6A *Corbin on Contracts* (1962); *see* 14 S. Williston, *A Treatise on the Law of Contracts* (3rd ed. 1972).

[3] *See, e.g., Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 197-98 (1844) ("the courst are not at liberty . . . to look at general considerations of the supposed public interests and policy beyond what [the] constitution and laws and judicial decisions make known to us"); *Baltimore & O.S.R. Co. v. Voight*, 176 U.S. 498, 505 (1900); *Black and White Taxicab & Transfer Co. v. Brown & Yellow Transfer Co.*, 276 U.S. 518, 528 (1928).

On this basis contracts were held to be unenforceable if the contract contained a promise to engage in conduct deemed "offensive" to public policy or a promise "that tends to induce . . . such conduct." *Restatement (Second) of Contracts* § 178, *Comment d.* And of particular significance here, there are many situations at common law "in which the conduct [called for by a contract] is not itself against public policy, but it is against public policy to promise to engage in such conduct"; common-law judges thus developed a set of rules (such as the rules against agreements in restraint of marriage or detrimental to the marital relationship) which defined circumstances in which it is "objectionable to make a commitment to engage in conduct that is not in itself objectionable," *id.*

The quite far-reaching authority that common-law courts thus exercised in refusing to enforce contracts on public policy grounds was subject to one important limitation, however: that authority has always been recognized to be subordinate to the ultimate power of the legislative branch to fix public policy. As this Court put it long ago

> While the court, unaided by legislative declaration, and applying principles of the common law, may uphold or condemn contracts in light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. [*Chicago B&Q R.Co. v. McGuire*, 219 U.S. 549, 565 (1911).]

Thus, the common law public policy doctrine incorporates the fundamental principle that "when the law-making power speaks on a particular subject over which it has constitutional power to legislative, public policy in such a case is what the statute enacts." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897).

(b) To the extent the common-law rules have any relevance is this § 301 action, it is the limitation just noted—and not the expansive general rule— that is con-

trolling. As we have seen, the NLRA declares a public policy for labor-management relations, one that defines the area of mandatory bargaining and provides that within that area, so long as the parties do not flout positive law, they are to be left free to make and enforce their own agreements and resolve disputes under those agreements. Under the common-law public policy doctrine, that *statutory* policy must prevail over any otherwise-applicable common-law notions which are inconsistent with the NLRA, such as the proposition that judges may define subjects as to which it is "objectionable" for an employer "to make a commitment," p. 9, *supra*.

But even if the common law doctrine did not itself establish the primacy of the NLRA in fixing public policy within the area to which the Act applies, there still would be no basis to allow common law considerations to trump the national labor policy. This is, after all, a § 301 action, and the ultimate question here is what authority that section confers on the courts to refuse to enforce collective bargaining agreements which are consistent with positive law. And that question, like all questions arising under § 301, is to be answered by "federal law, which the courts must fashion from the policy of our national labor laws," *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

Indeed, for that very reason this Court has heretofore rejected analogous attempts to equate § 301 law with the common law of contracts. As Justice Powell explained in his opinion for the Court in *Bowen v. United States Postal Service*, 459 U.S. 212, 220 (1983):

> The difficulty with this argument is that it treats the relationship between employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common law principles. [Such an argument] fails to recognize that a collective-bargaining agreement is much more than traditional common-law employment terminable at will. *Rather, it is an agreement creating relationships and interests under the*

federal common law of labor policy. [Emphasis added.] [4]

In sum, NWA's reliance on the common law misunderstands both the limits on the public policy doctrine that existed at common law and also the limits § 301 places on the use of common law concepts in enforcing labor contracts.

5. Misco and NWA attempt to defend the indefinite public policy exception they advocate on the ground that the courts can be expected to proceed with moderation in invalidating arbitration awards on public policy grounds. *See* Resp. Br. at 27; NWA Br. at 17. The argument is ultimately besides the point because, as we have seen, the national labor policy does not leave room for even the moderate use of an unstructured judicial power to overturn otherwise lawful agreements reached through collective bargaining. But even if the argument were somehow relevant, it is not supported by the experience in the four years since *W.R. Grace* was decided.

That experience is perhaps best summarized by considering the very cases to which Misco and NWA point. *Postal Service v. American Postal Workers Union* (*"APWU"*), 736 F.2d 822 (1st Cir. 1984), provides a useful illustration. There the court refused to enforce an award providing for the reinstatement of an employee who was discharged for embezzling a small amount of money from the Postal Service. The arbitrator entered

---

[4] NWA claims that *W.R. Grace* compels application of the common law rules because the decision states that, "[a]s with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." 461 U.S. at 766. But this sentence does not say that the *same* public policy rules apply under § 301 as are applied in an ordinary contract case. *Cf., Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("The language of an opinion is not always to be parsed as though we were dealing with the language of a statute"). And, as we have seen, common-law rules correctly understood do not in the final analysis help NWA here because the common law itself recognizes the primacy of statutes in declaring public policy.

that award after finding that the grievant had worked for the Postal Service for seven years without committing any misdeeds; that he had been under "unusual financial pressures" at the time of the embezzlement; and that the grievant intended to repay the Postal Service and indeed had retained records for that very purpose and had made some repayments. Moreover, the arbitrator had ordered grievant reinstated (following a long disciplinary suspension) to a position *in which he would not be handling money*. The court of appeals found that award to violate the public policy.

Similarly, in *S. D. Warren Co. v. Paperworkers*, 815 F.2d 178 (1st Cir. 1987), the court declined to enforce an award requiring the reinstatement of three (out of four grievants) discharged for selling small amounts of marijuana to an undercover agent at the employer's plant. The arbitrator found that each grievant "was the only female worker in her area of the mill"; that the undercover agent "was exceptionally sympathetic and helpful to [the grievants]"; that the agent "was the first to bring up the subject of marijuana, that he talked about it incessantly to the point where each [grievant] concluded that maybe if she satisfied [the agent's] persistent requests, he would leave her alone"; that the grievants had not brought marijuana "into the mill for their own use" and had not used the marijuana at the mill; that the grievants would not engage in similar conduct if reinstated; and that the discharges "were excessively harsh in light of [the employer's own] past disciplinary practice for similarly serious . . . violations" of the rule on which the employer relied.[5] The discharge of the one grievant who actually was guilty of using marijuana during work time was *sustained* by the arbitrator. The court of appeals concluded that public policy precluded the reinstatement of the other three grievants.

---

[5] All quotations are from the arbitrator's award in *S. D. Warren Co.*, AAA No. 1130-0908-84 (Sept. 19, 1985). A copy of the decision is being lodged with the Clerk of this Court.

In contrast, Misco and NWA denounce the decision in *Northwest Airlines v. Air Line Pilots Association*, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548, in which a panel of the D.C. Circuit (Edwards, Bork and Swygert, JJ) enforced an arbitration award directing the reinstatement of a pilot who had been discharged on alcohol-related grounds. Misco and NWA claim the court should have set aside the award on public policy grounds. But the arbitrator there found that the grievant had suffered from alcoholism, a treatable disease for which the grievant had, in fact, sought and received treatment followning his discharge, and the arbitrator further found that the employer itself had a policy of employing reformed alcoholics as pilots. Given these findings and the grievant's unblemished record of sixteen years of service to the employer, the arbitrator concluded that the grievant should be reinstated if, *but only if*, the Federal Air Surgeon certified that the grievant had "recovered from the effects of his alcoholism, including total abstinence from alcohol for not less than two years," 808 F.2d at 77-78. Misco and NWA contend that "public policy" requires that the airline be left free to refuse to reinstate a pilot whom the Federal Air Surgeon deemed fit for duty.[6]

What these cases and the others cited by Misco and NWA have in common is that they required a most profound human judgment: determining the appropriate level of "punishment" for the "crime" which the griev-

---

[6] *The Federal Aviation Administration permits* a recovered alcoholic to return to the cockpit without proving that he has been alcohol-free for two years if the pilot has been treated for and is found to have recovered from his alcoholism and if the airline provides monthly reports about the pilot, and the pilot's treatment program provides quarterly reports. The arbitrator in *Northwest Airlines* refused to allow the grievant to return under these conditions, but rather required the grievant to wait until he obtained an unconditional FAA license based on two years of abstinence. The net result of the arbitrator's decision was to leave the grievant without pay or benefits for close to three years.

ants were found to have committed.[7] More specifically, the arbitrators in these cases were called upon to decide whether the conduct of the grievants provided "just cause" for imposing the penalty of discharge which is commonly understood to be the industrial equivalent of capital punishment. A host of factors are, or may be thought to be, relevant in answering such a question including, *e.g.*, the nature of the offense, the nature of the offender, the need to deter future wrongdoing, and the possibility of rehabilitating the offender.

Determining how much weight should be given to these various factors in general or in a particular case is precisely the type of issue the collective bargaining process—including the grievance-arbitration procedure which is part of the "continuous collective bargaining process," *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 597—was created to resolve. The question so posed is not one to which there is a simple answer or an answer that is objectively "correct." Nor is it a question to which the law dictates an answer; indeed state legislatures tend to establish a range of penalties for analogous criminal offenses and leave it to the sentencing judge to decide within that range what penalty is "just" in a particular case. Yet in *APWU and S.D. Warren* the First Circuit took it upon itself to remove this matter from the ambit of collective bargaining on the simplistic ground that because the grievants in those cases had committed acts against public policy, any punishment less than the ultimate one (*i.e.*, less than discharge) necessarily violates public policy. And in *Northwest Air-*

---

[7] *United States Postal Service v. Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), which NWA (at 15), cites as another example of an award that should have been overturned on public policy grounds is similar: there the court enforced an award directing reinstatement of a grievant who had unlawfully delayed the mails, but the arbitrator predicated the reinstatement order on proof that the grievant—a compulsive gambler—had attending a gamblers anonymous program and had ceased gambling, and the arbitrator ordered the grievant to cooperate fully with the employer in assuring that the grievant did not return to gambling.

lines, according to Misco and NWA, the court should have done likewise.

In sum, the very cases on which Misco and NWA rely demonstrate that what is being advocated here is a "modest proposal" in the sense in which Jonathan Swift used that phrase.[8]

In the final analysis however, no decision can fully demonstrate the dangers of an amorphous public policy exception for the greatest risk is not that such an exception would be regularly abused by the courts, but rather that such an exception, because it is inherently formless, would invite (or at least permit) frequent litigation challenging arbitration awards. Although NWA asserts that there "has been no stampede to the courthouse by employers seeking to overturn arbitral reinstatement awards," NWA Br. at 16, the fact of the matter is that since *W.R. Grace*, there has been a significant increase in the number of public policy challenges to arbitral awards. Most of these challenges have been unsuccessful—and many frivolous—but almost all of them have proven costly and time-consuming to litigate.[9] And as

---

[8] Moreover, by focusing on a handful of circuit court cases, Misco and NWA are able to obscure the lengths to which some courts have been willing to go to overturn arbitration awards in the name of public policy. *Chicago Truck Drivers v. Denton Cartage Co.*, 649 F. Supp. 1009 (N.D. Ill. 1986), best reveals the danger of the indefinite public policy exception Misco and NWA here urge: in that case the court refused to enforce a default judgment entered against an employer by a joint grievance committee on the ground that the decision "violates the fundamental public policy of ensuring due process in legal disputes." *Id.* at 1012. *See also, e.g., Auto Workers v. Keystone Consolidated Industries, Inc.*, 782 F.2d 1400 (7th Cir. 1986), *vacated*, —— F.2d —— (7th Cir. 1987) (contract requiring employer to make pension contributions violates public policy); *Professional Administrators Ltd. v. Blevins*, No. 86-5556 (6th Cir., May 26, 1987) (arbitration award sustaining pension trustees action in increasing contribution rates violates public policy).

[9] *See, e.g., Bevles Co. v. Teamsters Local 968*, 791 F.2d 1391 (9th Cir. 1986) (four years to sustain arbitration award requiring

we stated in our opening brief, it is doubtful at best whether an arbitral system whose results are so frequently subject to challenge can long survive.

6. Misco and NWA argue finally that limiting the public policy exception to cases of conflict with positive law would lead to "absurd" (Resp. Br. at 19, 25, 27-28) or "dangerous" (NWA Br. at 20) results. The best refutation of that claim comes from the fact that neither Misco nor NWA is able to point to even a single case in which their fears were realized, or would have been realized under the principled public policy exception we urge. Indeed, as we have seen, the very cases on which Misco and NWA rely prove precisely the opposite.

Nor is it at all surprising that a broad judicial power to overturn arbitration awards is not necessary to avoid "absurd" or "dangerous" decision. The collective bargaining process, after all, is not likely to lead to the imposition of "absurd" or "dangerous" obligations on employers; aside from anything else, it is simply not in the self-interest of either party to propose or agree to such

---

reinstatement of undocumented aliens); *Orange Belt. Dist. Council of Painters v. Kashak*, 774 F.2d 985 (9th Cir. 1985) (two years to sustain arbitration decision holding employer bound by pre-hire agreement); *Culinary Union Local 226 v. Riverboat Casino Inc.*, —— F.2d ——, No. 86-2104 (9th Cir., May 14, 1987) (public policy challenge to award finding parties had reached an implied agreement governing the recall of striking employees); *Drummon Coal Co. v. Mine Workers*, 748 F.2d 1495 (11th Cir. 1984) (public policy challenge to arbitral award holding that employee who waited ten days after a layoff to notify the employer of a desire to return to work did not forfeit his recall rights); *Metropolitan Edison Co. v. Electrical Workers*, No. 86-6553 (E.D. Pa., Aug. 14, 1987) (public policy challenge to award holding that contract bars employer from unilaterally implementing random drug testing program) *Steelworkers v. National Can Corp.*, No. 86-C-7390 9 N.D. Ill., June 11, 1987) (public policy challenge to award ordering company to reinstate an employee returning from disability leave to employee's old job); *Hilton International Co. v. Union de Trabajadores*, 600 F. Supp. 1446 (D.P.R. 1985) (public policy challenge to award ordering reinstatement of employee discharged for pressing for higher tips).

terms. Nor is there any reason to suspect that arbitrators are more likely than judges to render "absurd" or "dangerous" awards under labor contracts; to the contrary, as the National Academy of Arbitrators demonstrates in its brief *amicus curiae* (at 15-20), arbitrators "necessarily . . . take into account that public policy relating to the justice of the discipline," *id.* at 15.

Moreover, to the extent that particular categories of employees *do* in fact pose a public danger, state legislatures and the United States Congress can be counted on to enact legislation safeguarding the public. It is hardly uncommon for legislatures at the state and federal level to enact laws that require persons performing particular tasks to obtain a license from the government; such laws are the rule, for example, in the transportation industry. And it is likewise quite common for legislatures and regulatory bodies to enact conditions on the granting of such licenses in order to protect public safety. Thus Misco's suggestion that confining the courts to enforcing positive law would "completely gut *W. R. Grace* of any meaning whatsoever," Resp. Br. at 27, is simply wrong.

In sum, the fears conjured up by Misco and NWA as to the evils of enforcing arbitral awards which are consistent with positive law prove, on inspection, to be illusory. In contrast, the dangers of the broad public policy exception applied by the courts below and advocated by Misco and NWA here are quite real and threaten fundamental aspects of the national labor policy.

II. The Asserted Public Policy Bases For Vacating The Arbitration Award Here

Even if, *arguendo*, Misco and NWA were correct in arguing that the courts in § 301 cases may refuse on public policy grounds to enforce arbitral awards which accord with positive law, it still would not follow that the court below properly refused to enforce the instant arbitration award. Indeed, Misco and NWA fail to provide any principled basis to justify the decision below.

1. At the threshold, it is important to bear in mind that, as we explained in our opening brief (at 4-5), the arbitral decision at issue here ultimately rests upon *procedural* and not substantive grounds. The Arbitrator did not decide whether possession of marijuana on company premises justifies discharge; all that the Arbitrator concluded is that the instant discharge could not be sustained on such a ground because Misco had not relied on this ground in effecting the discharge. What the Arbitrator held, then, is merely that "[a]n employee should know the offense with which he is charged and have the opportunity to defend his behavior," Pet. App. at 45a, and that those discharged on marijuana charges are entitled to this right. Neither Misco nor NWA makes any attempt to show how such a limited ruling—one which may not even foreclose the Company from attempting to discharge the grievant again for possessing the gleanings of marijuana in his car, so long as the Company expressly predicates the discharge on that ground—can conceivably violate public policy.

2. Rather than addressing the decision that the Arbitrator, in fact, rendered, Misco and NWA proceed as if the Arbitrator had decided, as a matter of substantive law under the parties' contract, that at discharge for possessing marijuana would not be contractually justified. Even if the Arbitrator had so held, the decision below overturning the award could not be sustained.

(a) Misco demonstrates that it is against the policy of the United States and Louisiana to possess marijuana. *See* Resp. Br. at 13-14. But the statutes on which Misco relies also establish the legislative judgment as to the appropriate penalty for such offenses, and those laws do not provide for the forfeiture of employment as part of the penalty. As the Second Circuit recognized long ago (in an opinion by then-judge, now Justice Marshall)

> In light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be

> a public policy that a man who has been convicted, fined, and subject to serious disciplinary measures can never be ordered reinstated to his former employment. [*Electrical Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963).]

Moreover, as we previously observed, determining the appropriate penalty for a particular offender who has committed a particular offense is one of the most difficult and complex judgments human beings are called upon to make. Public policy probably cannot—and in all events does not—provide a clear answer to that question. Thus, the fact that the grievant here may have committed a criminal act does not in and of itself establish that the reinstatement order violates public policy.

(b) Misco and NWA place their principal reliance on the "public policy" favoring safe workplaces in an attempt to justify the lower court's refusal to enforce the arbitration award. *See* Resp. Br. at 18; NWA Br. at 20. These arguments proceed from a premise contrary to the facts.

Although Misco and NWA pretend otherwise, the Arbitrator here found, as a matter of fact, that Misco *failed* to prove that the grievant was guilty of using marijuana during work time. The only offense of which the grievant was even arguably found guilty was leaving in his car a plastic scale case (for a scale that grievant kept at home) which case contained gleanings of marijuana. Thus it simply is not true, as NWA asserts (at p. 20 of its brief), that the grievant "has already shown his disregard for his own physical safety and the safety of others." And the asserted "public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol" which Misco invokes (at p. 18 of its brief) is not implicated here, as this case does not involve an individual found to have engaged in (or to be likely to engage in) such misconduct.

Under even the broadest variant of the common law doctrine permitting the courts to refuse to enforce ordinary contracts on public policy grounds "it must be

clearly established that public policy would be violated before [one] may raise that objection to prevent enforcement of the contract." *Steele v. Drummond*, 275 U.S. 199, 206 (1927). *A fortiori*, such clear proof must be required in the § 301 context. Misco completely fails to provide such proof here.[10]

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

---

[10] Misco alternatively argues that the arbitration award was not entitled to enforcement because the arbitrator "exceeded his authority and dispensed his own brand of industrial justice." Resp. Br. at 32. Ordinarily we would suggest that such an argument—which was not passed upon by the court of appeals—would warrant review by the lower court in the first instance. *Cf. Electrical Workers v. Hechler*, —— U.S. ——, 55 L.W. 4694, 4698 (May 26, 1987). In the instant case, however, we believe the argument is so plainly without merit that it should be summarily disposed of by this Court.

The Arbitrator in this case stated seven criteria, "based on the questions set forth by Arbitrator Daugherty in an appendix to *Enterprise Wire Co.* (46 LA 359), for determining whether just cause exists for a discharge." Pet. App. at 43a-44a. Misco does not deny that these criteria "draw their essence" from the collective bargaining agreement.

The Arbitrator went on to find that the Company had failed to prove "the charge against the employee," *id.* at 44a, and the Arbitrator concluded (as previously noted) that the discharge could not be sustained on grounds not relied upon the company in effecting the discharge, p. —, *supra*. This was the dispositive basis for the decision. The rule the Arbitrator thus applied—that a discharge can be sustained only on the grounds on which the discharge was based—is a rule which arbitrators generally follow in just-cause cases. *See* Pet. Br. at 5 n.5. We are at a loss to understand—and Misco does not explain—how the Arbitrator "exceeded his authority" in following that rule here. That being so, Misco's attack on various statements made by the Arbitrator in the course of discussing the *other* criteria—even if the attack were justified (and it is not)—is, in any event, beside the point, for the *dispositive* ground of the Arbitrator's decision is not subject to challenge.

Respectfully submitted,

LYNN AGEE
MARK BROOKS
3340 Perimeter Hill
P.O. Box 1475
Nashville, TN 37202

MICHAEL GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Petitioners